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84-1827

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROBERT F. SIMONE,
Petitioner

v.

GOLDEN NUGGET HOTEL & CASINO,
t/a G.N.A.C. CORP.,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS

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QUESTION PRESENTED

Whether, in view of this Court's decision in *Phillips v. Negley*, 117 U.S. 665 (1886), establishing the appealability of a void new trial order, the Court of Appeals erred in rejecting jurisdiction of an appeal from a new trial order issued by the District Court for a reason raised *sua sponte* and without the notice expressly required by Rule 59(d) of the Federal Rules of Civil Procedure as a condition of the court's power.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Reference to Opinions Below	1
Statement of Grounds for Jurisdiction	2
Rule in Question	2
Statement of the Case	2
Reason for Granting the Writ	5
The Trial Court's New Trial Order, Which Was Entered Without Notice For a Reason Raised *Sua Sponte* by the Trial Court, is Void and Appealable	
Conclusion	9
Appendix:	
Judgment Order of the Court of Appeals	A-1
Opinion of the District Court	A-2
Orders of the District Court	A-38
Order of the Court of Appeals Denying Reargument	A-40

TABLE OF AUTHORITIES

Cases:

Bailey v. Slentz, 189 F.2d 406 (10th Cir. 1951) .. 6

Central Microfilm Service v. Basic/Four Corp., 688 F.2d 1206 (8th Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983) 7, 8

Demeretz v. Daniels Motor Freight, Inc., 307 F.2d 469 (3d Cir. 1962) 5

Freid v. McGrath, 133 F.2d 350 (D.C. Cir. 1942) . 5, 6

Harkins v. Ford Motor Co., 437 F.2d 276 (3d Cir. 1970) 7, 8, 9

King v. Deutsche-Dampfs-Ges v. International Terminal Operating Co., 397 F. Supp. 618 (S.D.N.Y. 1974), *aff'd*, 523 F.2d 1042 (2d Cir. 1975) 6

Lapiczak v. Zaist, 451 F.2d 79 (2d Cir. 1971) 5, 6, 8, 9

Peterman v. Chicago, Rock Island & Pacific Ry. Co., 493 F.2d 88 (8th Cir. 1974), *cert. denied*, 417 U.S. 947 (1975) 5

Phillips v. Negley, 117 U.S. 665 (1886) 1, 5, 8, 9

Stradley v. Cortez, 518 F.2d 488 (3d Cir. 1975) .. 5

Tarlton v. Exxon, 688 F.2d 973 (5th Cir. 1982), *cert. denied sub nom. Diamond Drilling Corp. v. Tarlton*, 103 S. Ct. 3536 (1983) 5, 8

Tsai v. Rosenthal, 297 F.2d 14 (8th Cir. 1961) .. 5

Wilkerson v. Saver, 72 F.R.D. 605 (E.D.Ark. 1976) 6

TABLE OF AUTHORITIES—(*Continued*)

Statutes and Rules:

28 U.S.C. §1254(1) 2

28 U.S.C. §1291 4

28 U.S.C. §1441 2

Rule 59(d), Federal Rules of Civil Procedure 2, 4, 5, 6, 7, 8, 9

Notes of the Advisory Committee on Rule 59, F.R.Civ.P. 6

Other Authorities:

C. *Wright, The Law of Federal Courts* §95, at 636 (4th ed. 1983) 5

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REFERENCE TO OPINIONS BELOW

The opinion of the District Court is unreported.

The United States Court of Appeals for the Third Circuit by an unpublished judgment order dismissed the appeal of the Petitioner for lack of jurisdiction. Rehearing was denied by an unpublished Order.

The opinion and orders of the District Court, the judgment order of the Court of Appeals, and the order of the Court of Appeals denying rehearing appear in the Appendix.

STATEMENT OF GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 22, 1985. The Petitioner filed a timely application for rehearing which was denied on April 16, 1985.

This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Third Circuit by writ of certiorari pursuant to 28 U.S.C. §1254(1).

RULE IN QUESTION

Rule 59(d), Federal Rules of Civil Procedure provides as follows:

> *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

STATEMENT OF THE CASE

Petitioner Robert F. Simone filed this civil action against the Golden Nugget Hotel and Casino raising claims of assault and battery, false imprisonment, malicious prosecution and abuse of process.[1] These claims arose when Golden Nugget employees took Mr. Simone, an attorney, into custody after he inquired about a disturbance involving a client. At trial Mr. Simone presented evidence that he was confined against his will and was physically harmed. He showed that Golden Nugget employees directed his arrest by Atlantic City

1. The District Court had removal jurisdiction pursuant to 28 U.S.C. §1441, based on diversity between the parties.

Police and then pressed a criminal prosecution which resulted favorably to Mr. Simone.

The jury found in Mr. Simone's favor on the false imprisonment and abuse of process claim. It awarded $150,000 in compensatory damages and $1,000,000 in punitive damages. The jury found for the Golden Nugget on the claims of assault and battery and malicious prosecution.

Mr. Simone filed post-trial motions expressly limited to the claims which he lost — assault and battery and malicious prosecution. The Golden Nugget filed post-trial motions seeking judgment n.o.v. and a new trial on the claims which Mr. Simone won — false imprisonment and abuse of process.

The Honorable James T. Giles in the United States District Court for the Eastern District of Pennsylvania, more than fifteen months after judgment was entered on the jury's verdict, granted the Golden Nugget's motion for judgment n.o.v. on the abuse of process claim and awarded a new trial on the false imprisonment claim. This action by the trial court took away the jury's awards. Mr. Simone's motions were denied.

The trial court's opinion was very specific in explaining why it ordered a new trial of Mr. Simone's successful false imprisonment claim. It did so because of an error the court committed *against Mr. Simone* at trial. The trial court had charged the jury that Mr. Simone was entitled to recover future medical expenses only if he could prove such expenses to a "reasonable certainty." In its opinion granting a new trial, the trial court stated that the plaintiff should have had the benefit of a "more correct" charge to the jury allowing recovery of "reasonably probable" future medical expenses as a result of physical injuries instead of only "reasonably certain" expenses. (App. at 22-23). This was a remarkable decision because Mr. Simone did not wish in any way to

disturb the verdict he won on false imprisonment and for that very reason made no motion whatsoever challenging it. Additionally, the defendant Golden Nugget's post-trial motion never suggested that the trial court unduly restricted the plaintiff's damages and that the plaintiff should therefore be given a new trial to recover a larger verdict. The trial court plainly acted entirely on its own initiative.

On appeal to the United States Court of Appeals for the Third Circuit, Petitioner, Mr. Simone, directly invoked 28 U.S.C. §1291 on the established ground that the trial court's order was jurisdictionally barred by Rule 59(d), F.R.Civ.P., and therefore was final and appealable. At no time did the trial court undertake to comply with the mandate in Rule 59(d) that notice be given before a new trial is granted "for a reason not stated in the motion."

In dismissing Mr. Simone's appeal for lack of jurisdiction, the Court of Appeals contradicted the specific limitations placed on the trial court's power by Rule 59(d). Its implicit holding that an order of new trial was not appealable although issued beyond the limits of Rule 59(d) is in conflict with the principles expressed in prior case law of the Courts of Appeals and this Honorable Court.[2]

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2. Although there is no opinion setting forth the reasons for the Third Circuit Panel's decision, the nature and importance of the Panel's ruling is clearly revealed in the extensive briefing on the jurisdictional point. After the appeal was filed in the Court of Appeals, the issue of jurisdiction was specially briefed in advance at the Court's request. The Court thereafter deferred decision on the matter to the Panel which would hear the merits. The briefs on the merits then also addressed the issue of appellate jurisdiction. At oral argument held on March 11, 1985, appellate jurisdiction was the sole subject of inquiry by the Panel. During the argument, the court requested additional supplemental briefing on that subject. This extensive attention is indicative of the importance attached to the issue.

REASONS FOR GRANTING THE WRIT

The Trial Court's New Trial Order, Which Was Entered Without Notice For a Reason Raised Sua Sponte By the Trial Court, is Void and Appealable

Although ordinarily an order granting a new trial is interlocutory and not immediately appealable, there is a classic exception where the new trial order is challenged on the ground that the District Court lacked the power to enter it. Numerous decisions of the Courts of Appeals have embraced that classic exception in accordance with this Court's decision in *Phillips v. Negley*, 117 U.S. 665 (1886). *E.g.*, *Tarlton v. Exxon*, 688 F.2d 973 (5th Cir. 1982), *cert. denied sub nom. Diamond M. Drilling Corp. v. Tarlton*, 103 S. Ct. 3536 (1983); *Stradley v. Cortez*, 518 F.2d 488 (3d Cir. 1975); *Peterman v. Chicago, Rock Island & Pacific Ry. Co.*, 493 F.2d 88 (8th Cir. 1974), *cert. denied*, 417 U.S. 947 (1975); *Lapiczak v. Zaist*, 451 F.2d 79 (2d Cir. 1971); *Demeretz v. Daniels Motor Freight, Inc.*, 307 F.2d 469 (3d Cir. 1962); *Tsai v. Rosenthal*, 297 F.2d 14 (8th Cir. 1961); *Freid v. McGrath*, 133 F.2d 350 (D.C. Cir. 1942); C. *Wright, The Law of Federal Courts* §95, at 636 (4th ed. 1983). There is no reported decision known to the Petitioner which contradicts the principle established in *Phillips*.

The procedure by which a new trial is awarded in federal court is set forth in Rule 59 of the Federal Rules of Civil Procedure. Subsection (d) of that rule defines the limited circumstances in which a new trial order may be issued for reasons raised by the court rather than by a party. Rule 59(d) provides:

> Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving a party notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely

> served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

Prior to the 1966 amendment to Rule 59(d), a District Court could never grant a new trial for reasons of its own beyond the ten day period after the entry of judgment upon a jury's verdict. *Bailey v. Slentz*, 189 F.2d 406, 409 (10th Cir. 1951); *Freid v. McGrath*, 133 F.2d 350, 356 (D.C. Cir. 1942). The 1966 amendment, comprising what is now the second sentence in Rule 59(d), for the first time authorized a District Court to order a new trial for its own reasons more than ten days after judgment if a timely motion for new trial had been filed. That extension of judicial power was, however, expressly conditional on providing advance notice of a hearing. The power arose "[a]fter giving a party notice and an opportunity to be heard . . ." As stated in the Notes of the Advisory Committee on Rules: "The second sentence added by amendment to Rule 59(d) confirms the court's power . . . *with provision that the parties be afforded a hearing before the power is exercised.*" (Emphasis added.)[3]

It has long been assumed by the Courts of Appeals that the extension of power flowing from the 1966 amendment is indeed qualified by the notice mandate included in that amendment. In *Lapiczak v. Zaist*, 451 F.2d 79 (2d Cir. 1971), the Second Circuit Court of Appeals stated this very assumption. The court observed that the 1966 addition to Rule 59(d) gave

> the trial judge power to set aside a verdict, on motion of a party, on grounds not asserted in the motion, *provided the parties are given notice and an opportunity to be heard.*

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3. Satisfying the specific notice requirement presents no difficulty whatsoever to a District Court. *E.g., Wilkerson v. Saver*, 72 F.R.D. 605, 609, (E.D.Ark. 1976); *King v. Deutsche-Dampfs-Ges v. International Terminal Operating Co.*, 397 F. Supp. 618, 622 (S.D.N.Y. 1974), *aff'd*, 523 F.2d 1042 (2d Cir. 1975).

451 F.2d at 80 (emphasis added).

More recently, the Eighth Circuit Court of Appeals in *Central Microfilm Service v. Basic/Four Corp.*, 688 F.2d 1206 (8th Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983), reaffirmed this clear understanding:

> When a party has timely moved for a new trial but the court orders such relief on a ground not raised in the motion, the court is deemed to have acted on its own initiative. Under Rule 59, however, the court has authority to act outside the ten-day limit in this circumstance, *provided* it gives the parties notice and an opportunity to be heard. . . . See *Wright & Miller*, Fed. Prac. & Proc. §2813.

Id. at 1211 (emphasis added).[4]

No such notice was ever given in this case. The new trial order was therefore void and appealable.

The Third Circuit Court of Appeals itself previously recognized that a lack of notice renders void and appealable a new trial order which is granted for the District Court's own reasons. In *Harkins v. Ford Motor Co.*, 437 F.2d 276 (3d Cir. 1970), the trial court had ordered a new trial "for two reasons, neither of which had been clearly stated in the plaintiff's motion for a new trial. . . ." *Id.* at 276. The notice requirements of Rule

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4. The Eighth Circuit in *Central Microfilm* described as "unsettled" the question whether a failure to give notice prescribed by the rule rendered the new trial order null and void. The court in that case did not directly confront the question because the district court had entertained a motion for reconsideration. The Court of Appeals believed that the reconsideration satisfied the terms of Rule 59(d) in any event. The court stated:

> Accordingly, we decline to adopt a rule which would render new trial orders immediately appeable where the only defect is a technical lack of notice and *such defect is cured by a subsequent opportunity to be heard.*

In the present case, of course, the lack of notice was not cured. 688 F.2d at 1212 (emphasis added).

59(d) had not been complied with — just as they were not complied with in the present case. The court stated:

> We do not find it necessary to resolve the question whether, in every case, failure to comply with the notice requirements of Fed.R.Civ.P. 59(d) deprives the district court of power to grant a new trial for reasons not stated in a pending motion for a new trial, because we have concluded that the reasons advanced by the district court are insufficient on the merits.

Id. at 277. Despite its ostensible reservation, the court in *Harkins* unquestionably held that the failure to give the required notice did render the new trial order both void and appealable. *See Central Microfilm Service v. Basic/Four Corp., supra,* 688 F.2d at 1211-12 (discussing *Harkins*). That holding was a prerequisite for reviewing the merits of, and then reversing, the new trial order.

Before the 1966 amendment to Rule 59(d), the trial court would never have had jurisdiction to issue on its own a new trial order more than ten days after judgment. The earlier limit had been designed to protect and secure the jury's verdict in the absence of an injustice which would be obvious immediately after trial. *See Tarlton v. Exxon, supra,* 688 F.2d at 978-79. The amendment to Rule 59(d) qualified that strict limitation, but did so only within expressed new limits. It did not invite wholesale intrusions upon the jury's province.[5]

The breach of the simple and clear notice mandate of Rule 59(d) in this case rendered the District Court's order void and appealable. Any other conclusion reduces

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5. The injustice of the trial court's excess is particularly acute in this case. The new trial order was issued because of an error at trial harmful only to a plaintiff who never even moved to upset the verdict he won. The District Court's decision was a serious intrusion into the sanctity of a jury verdict. It is the very purpose of Rule 59(d) to prevent such abuse.

the notice requirement to useless verbage which a District Court may or may not observe at its pleasure. That is not the purpose of the 1966 amendment. Indeed, no sound purpose is served by ignoring the plain language of Rule 59(d) and thereby injecting mystery and uncertainty into the very principles by which parties must determine when they are required to appeal.

CONCLUSION

The Third Circuit Court of Appeals in the present case clearly exceeded Rule 59(d)'s limited extension of the District Court's power. It silently abandoned its own holding in *Harkins* and departed from the established principle expressed in *Lapiczak* and elsewhere allowing a new trial order *sua sponte* more than ten days after judgment *provided* the requisite notice is given. In dismissing Petitioner's appeal for lack of jurisdiction, the Court of Appeals thus committed one of two serious errors: it either wrongly validated a new trial order which was void by operation of Rule 59(d); or it wrongly held that the order was void but still was not appealable, thus disregarding this Court's century-old holding in *Phillips v. Negley*, 117 U.S. 665 (1886). Because of the compelling interest in maintaining a uniform and orderly administration of appellate jurisdiction, preserving the limits of the District Court's power, and assuring respect for the jury trial process, this case fully warrants review by this Honorable Court.

Wherefore, Petitioner respectfully requests this Honorable Court to grant his Petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1454

SIMONE, ROBERT F.

Appellant

v.

GOLDEN NUGGET HOTEL AND CASINO,
trading as G.N.A.C. Corp.

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 82-1450
District Judge: Honorable James T. Giles

Argued March 11, 1985
Before: HUNTER, GARTH, and VAN DUSEN,
Circuit Judges

JUDGMENT ORDER

It is ORDERED that the appeal be dismissed for lack of jurisdiction.

Costs taxed against appellant pursuant to Fed. R. App. P. 38.

By the Court,

JAMES HUNTER, III, *Circuit Judge*

Attest:

Chief Deputy Clerk

Dated: March 22, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT F. SIMONE	:	CIVIL ACTION
	:	
v.	:	
	:	Filed July 1, 1984
GOLDEN NUGGET HOTEL & CASINO, et al.	:	No. 82-1450

MEMORANDUM AND ORDER

GILES, J. JULY 11, 1984

Robert Simone contends that he was physically abused by security guards at the Atlantic City Golden Nugget Hotel and Casino on the night of August 24, 1981. Suit was brought against the casino for assault and battery, false imprisonment, malicious prosecution, and abuse of process. The case was tried before a jury. A verdict was rendered in favor of the plaintiff on the abuse of process and false imprisonment claims and in favor of the defendant on the assault and battery and malicious prosecution claims. Plaintiff was awarded $150,000.00 in compensatory damages and $1,000,000.00 in punitive damages. Both sides have filed post-trial motions, citing a variety of errors allegedly committed by the court as well as certain purported inconsistencies in the jury's verdict. Each seeks a judgment nothwithstanding the verdict or a new trial on the issues lost. Alternatively, defendant seeks a remittur as to compensatory and punitive damages. Plaintiff has also moved for delay damages under Pa. R. Civ. P. 238. It is agreed by the parties that the substantive law of New Jersey applies.

I. THE EVIDENCE

Usually, there are three different versions of the facts; the plaintiff's, the defendant's and truth as found by the jury. This case is no exception. According to plaintiff, he had arranged a meeting with a client, Stanley Branche, in the Rangoon Saloon of the Golden Nugget Casino on the evening of August 24, 1981 to discuss several legal matters. The Rangoon Saloon is on the same floor as casino operations and is on the boardwalk side of the building. Just as he had finished these discussions and was preparing to leave the area, plaintiff claims that he heard a commotion near a blackjack table. The source of the disturbance, a group of people including casino security guards, began to move towards the steps of the Saloon where plaintiff was then standing. When the group was ten or fifteen feet away, plaintiff recognized the three men being escorted by the security guards as Salvatore Merlino ("Merlino"), Thomas Delgiorno ("Delgiorno"), and Charles Warrington ("Warrington"). Plaintiff had been legal counsel to Warrington. He thought he heard one of them call to him. He approached one of the guards, whom he believed to be Captain Long, identified himself as an attorney for the men and inquired what was going on. With profane language, Long allegedly told plaintiff that it was none of his business. Long then ordered the other guards to "take him too," referring to Simone. Upon that command, plaintiff was grabbed about the neck and pulled from the casino floor, through a walkway and into the lobby by a tall, large, black guard, later identified as Sergeant Dixon. In the lobby, plaintiff was held only by the arm by a guard other than Dixon. At that point, plaintiff, along with Merlino, Delgiorno and Warrington, started walking away from the guards, towards the main lobby. This was an exit from the casino area but also the entrance to the hotel part of the complex. Before they could reach the main lobby doors, the guards grabbed them

and pushed them through doors to a service elevator area off the lobby. According to plaintiff and other witnesses, there was considerable commotion from a crowd which had formed behind the guards. Patrons or other persons were pushing, kicking and yelling in an effort to aid plaintiff and the other men. To keep the crowd away, the door to the service elevator area was closed and bolted by the guards with a board. Inside the service elevator area, plaintiff asked Captain Long why he and the others were being restrained. He was told that they were being "formally evicted." Plaintiff claims that when the service elevator doors opened, Dixon picked him up by the back of his shirt and the seat of his pants and threw him bodily into the elevator. His back hit the rear of the elevator and he crumpled to the floor. All the others, guards included, then crowded onto the same elevator expecting to go to the second floor where the guards' office was located. The elevator door closed but after a few minutes it was apparent that the elevator was not working. The doors opened and plaintiff and the others were then taken from the service elevator, out of the casino building and escorted toward a side street entrance located in the carport area. These outside steps led up to the second floor guards' office. Once outside, plaintiff, Warrington, Merlino and DelGiorno all attempted to pull away and escape. The guards resisted and a scuffle ensued. An Atlantic City police car happened by and observed the struggle. Captain Long asked the police to arrest the men. At the point of arrest, plaintiff was admittedly loud and profane. This raucous conduct continued on the way to the police station, resulting in assault and battery charges being lodged against plaintiff by the police officers. Apparently, plaintiff was later convicted of these criminal charges. However, plaintiff was not told at the time of arrest or at the station why he had been arrested or what the casino's charges were. Plaintiff was held over night and did not learn until the following morning that two of the casino guards, Dixon and Palmieri, had filed complaints charging that he had

struck and beaten each about the face and body. *See* Exhibits P-5 and P-6; N.T. at 1.75-77. These casino guards' charges against Simone were dismissed at the preliminary hearing stage. Plaintiff contends that the charges as filed were known to be false, giving rise to his action for malicious prosecution and abuse of process.

From the defendant's perspective, the events were quite different. Sergeant Dixon testified that he was called to one of the blackjack tables because of a reported disturbance by a disorderly patron. He determined that the man should be removed from the floor of the casino and began to escort him by the arm towards the boardwalk entrance, which was situated near the Rangoon Saloon. Two other persons attempted to come to the patron's aid and joined the patron in his verbal abuse of Dixon. About ten feet from the Saloon, plaintiff intervened, joining Merlino, Delgiorno and Warrington in the verbal assault on Dixon, using profanity and racial slurs. Near the door, they all pushed past Dixon and entered the Rangoon Saloon and sat down. Dixon called Captain Long, reporting the incidents to him. Long decided to ask the four to leave the casino. They refused. Long then decided to initiate what is called a formal eviction. This procedure is applicable in non-arrest situations to persons whom the casino seeks to bar from the premises *in futuro* because of disorderly or otherwise objectionable conduct. The patron is escorted to an upstairs office where a photograph is taken and an eviction form statement is read. The patron is then escorted from the building and told the consequences of returning, that is, arrest for defiant trespass.[1]

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1. One of the casino witnesses, Walter Moore, head of casino security, testified that the formal eviction procedure is not to be carried out in any case where the patron is unwilling to cooperate. Further, Moore testified that the patron would not know he was being formally evicted until the eviction notice and its ramifications were read. The photograph was said not to be essential to the formal eviction process but is used to identify the persons should they attempt to reenter the premises.

Dixon testified that after Long made the decision to invoke the formal eviction procedure, the chairs of the four were pulled back. Before they were touched to be lifted from their seats, the four stood up voluntarily and walked with the guards out of the rear door of the Rangoon Saloon to the hall lobby. The four men then turned and walked away towards the main lobby. The guards stopped them. A brief scuffle ensued and the four were escorted into the service elevator area. Once inside, further jostling occurred. Plaintiff allegedly pushed Dixon. Dixon pushed him back. Plaintiff came at Dixon a second time. Dixon stepped aside and pushed Simone away from him. As a result, Simone ended up in the elevator, which happened to be open. Dixon's recollection of the succeeding events with plaintiff outside the casino roughly correspond to plaintiff's. Upon arrest, there was a brief fracas between the four men and the police. After the police left, the guards went to the security command office. After discussing the events of the evening, Long decided that Dixon and fellow guard Palmieri should go to the police station to sign a complaint. There was no testimony that Long told the casino guards what to say in the complaints or how to fill them out. The guards testified that in accordance with local police practice, they gave handwritten signed statements to the police. After they left the station, the police formalized the charges on separate typed complaint forms, which had already been signed in blank by them.[2] Dixon and Palmieri testified that their handwritten statements stated only that Simone pushed them in the chest. This description corresponded with their testimony at the preliminary hearing and before this court. However, the formal complaints indicated that the guards were struck about the face and body. The casino attributed this change in language to police personnel making the formal charges.

2. A representative of the Atlantic City police department was not called to testify about this local practice of signing complaints in blank, allowing the police to fill in the formal charges out of the presence of the complaintant. Nor was Long called as a witness by either side.

Several of the other security guards who reported to the Rangoon Saloon to aid in the formal eviction testified that originally only two patrons were to be evicted. Simone was not one of them. Guards Rouse, Bessey and Witel stated that Simone verbally interfered with the eviction proceedings in the Saloon. The two men were then escorted from the casino to the lobby area by the guards. Simone followed, and with the aid of another man, physically intervened by pushing and shoving the guards. The pushing and shoving continued as the guards and the two patrons to be formally evicted entered the service elevator area. Plaintiff and a fourth unidentified man then pushed their way into that service elevator area. When the service elevator area door was bolted shut, there were four patrons in the area instead of two. The guards further testified that Simone pushed Dixon away to reach the two patrons being formally evicted. After the pushing and shoving ended, plaintiff and the fourth man were told by Long that because of their interference they were going to be formally evicted as well. None of these guards saw Dixon push Simone into the elevator.

At the trial, plaintiff sought damages for personal injuries, as well as for humiliation, fear and the mental anguish of spending a night in jail. Simone's primary physical complaints centered around his neck and back. These injuries allegedly resulted from Dixon dragging Simone out of the casino by his neck and later throwing him into the elevator. The latter incident also caused a minor injury to plaintiff's ankle.[3] Plaintiff claimed entitlement to past, present and future losses, including loss of future earning capacity.

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3. Other physical injuries claimed by plaintiff at the outset of the trial were the result of alleged mistreatment by the Atlantic City Police. Simone's head was allegedly banged against a table and his wrist injured. These claims were withdrawn mid-way through the trial. For purposes of analysis of the opening statement, it is important to remember that these claims were viable at the beginning of the trial. *See* note 12, *infra*.

II. DISCUSSION

A. The Assault and Battery Claim

After hearing the conflicting accounts of the events in this case, the jury returned a verdict in favor of defendant on the assault and battery count. In moving for a judgment notwithstanding the verdict or a new trial, plaintiff questions the sufficiency of the evidence and alleges that various errors were committed by the court in its charge to the jury. Because I conclude that the charge was proper and the verdict supported by the weight of the evidence, the jury's verdict on this count shall be upheld.

1. Sufficiency of the Evidence

For some inexplicable reason, plaintiff asserts that there was no evidence presented to dispute his version of the facts; that he was grabbed by the neck, dragged from the casino, thrown into a service elevator and generally manhandled without provocation or justification. Consequently, he argues that the court erred in submitting this issue to the jury. Since testimony was presented which directly contradicted plaintiff's scenario, this contention is devoid of merit and must be rejected.

2. The Charge

At the outset, I note that the instruction given on assault and battery was in total conformity with New Jersey Model Charge 3.10.[4] Plaintiff faults the court for in-

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4. The jury was charged as follows:

The fourth claim is assault and battery. The plaintiff claims that under the evidence and the law, he was the victim of assault and battery by casino personnel and that as a result of those actions which are claimed to be unlawful and unjustified, that he sustained certain injuries for which — physical injuries for which he seeks damages.

An assault is an attempt or offer to touch or strike the person of

structing the jury on the elements of the tort three times. The repetition of the charge was in response to specific requests from the deliberating jury. Therefore, this assignment of error is patently frivolous. However, plaintiff's other exceptions warrant more detailed discussion.

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another. That means, the body of another, with unlawful force or violence. A battery necessarily includes a preceding assault and, in addition, extends to the actual touching or striking of the person with an intent to do so with unlawful force or violence. The terms "violence" and "force" mean the same thing when used in relation to assault and battery and include any application of force to the body of the person or the plaintiff, even though it entails no pain or bodily harm and leaves no mark. No particular degree of force or violence is necessary for an assault and battery, and, therefore, the least touching or striking of the body of a person or plaintiff, without legal justification, against his will, constitutes an assault and battery.

The defendant denies that it should be called upon to pay damages to the plaintiff on the ground that whatever injury was sustained by the plaintiff was inflicted by the defendant or its employees in defense against an assault being made upon it or its employees by the plaintiff. Therefore, it raises what is known in the law as a defense of self defense. In a sense, it's been introduced by the defendant, the law imposes upon the defendant the burden of proving that claim according to the standard of preponderance of the evidence. And I've already told you about the preponderance of the evidence.

Here the defendant claims: 1, that there was no unlawful or unreasonable force exercised by its employees; and if there was a touching or pushing or striking, that it was done in self defense.

Fundamentally, no person has a lawful right to lay hostile and menacing hands on another. However, the law does not require anyone to submit meekly to the unlawful infliction of violence upon him. He may resist the use or threatened use of force upon him. He may meet force with force, but he may use only such force as reasonably appears to him to be necessary under all the circumstances for the purpose of self protection.

Accordingly, if you find that the defendant, through its employees or agents in this case, has succeeded in proving that the employee or agent was under attack by the plaintiff, and that

a. Self-Defense

Plaintiff contends that the court erred by instructing the jury on self-defense as a justification, arguing that it was factually inappropriate. A self-defense claim was raised by Dixon's version of the elevator incident. Dixon denied picking Simone up and throwing him into

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the injury sustained, if any was sustained by the plaintiff, was inflicted by the defendants having used only such force as under all the circumstances was necessary or reasonably appeared to have been necessary for self protection, then the defense of self defense has been proven and you must find in favor of the defendant and against the plaintiff.

Should you find, however, that the defendant was or its employees was not under attack or if he was under attack, that he used more force than reasonably appeared necessary to defend himself, or that he intended to use force after the apparent necessity for self defense has ceased, then the defense of self defense has not been proven.

You must bear in mind, however, that one is not ordinarily expected to exercise the same refined degree of judgment at times of great stress or excitement that he would under more placid or peaceful circumstances employ.

And so the degree of force actually used by the defendant should not be appraised by you from the standpoint of one who has the leisure are to make a calm, unhurried judgment. The conduct of the parties at the moment of conflict should be evaluated by you from their prospective at that time, and in the light of the judgment of which they were then reasonably capable.

The plaintiff claims that as a result of unjustified touching of his body or unreasonable use of force by the defendant under the circumstances, that he was caused to suffer certain physical injuries and trauma and mental distress or anguish related to the physical injuries.

Under the law of New Jersey, the use of force is not justifiable to resist force used by the occupier or possessor of property or by another person on his behalf when the actor knows that the person using the force is doing so under a claim of right.

Now, what I have said with respect to the — strike that.

The law does not require the defendant's employees to submit meekly to an unlawful infliction of violence upon them. They have the right to resist the use or threatened use of force upon

the elevator. According to Dixon's testimony, plaintiff pushed him near the service elevator. When Simone tried a second time, Dixon stepped aside and pushed him into the then open elevator. (N.T. at 4.245). As has been seen, plaintiff's version of the events up to that point is diametrically opposed to Dixon's. However, it was the function of the jury, assessing all of the testimony and factors such as credibility, to determine what actually occurred. The jury could have discredited Simone's testimony and credited Dixon's, finding that Dixon only pushed Simone into the elevator in response to Simone's attempt to attack him. Therefore, Dixon's action could have been deemed justified in self defense.[5]

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them. But they meet force with force only as reasonably appears to them to be necessary under all of the circumstances for the purpose of self protection.

To the extent that the plaintiff claims that he met force with force, then the plaintiff has the burden of showing that by a fair preponderance of the evidence.

A corporation or employer may act through the authorized actions of its employees or agents.

So that with respect to actions taken by employees here, those actions which may have been shown to have been directly authorized or undertaken in the furtherance of the employer's business, or ratified subsequently by the employer, would be chargeable to the employer.

Unauthorized actions, unratified actions or actions undertaken outside of the scope of employment would not be charged on the employer.

So the plaintiff has the burden of showing when agents or employees of defendant acted, that they were acting for the defendant.

N.T. at 7.31-35. *Cf:* New Jersey Model Charge 3.10.

5. The defendant denied any other action giving rise to a physical injury claimed by plaintiff. Contrary to plaintiff's assertions, defendant did not contend that the guards grabbed Simone about the neck of dragged him from the casino in self-defense. Dixon specifically denied placing Simone in a headlock and dragging him through the casino. (N.T. at 4.246).

b. Emergency Doctrine

Plaintiff assails this court's charge and, by implication, the New Jersey Model Instruction, for including reference to the "emergency doctrine." The charge explained that when considering whether unreasonable force was used under the circumstances, the jury should

> . . . bear in mind, however, that one is not ordinarily expected to exercise the same degree of judgment at times of great stress or excitement that he would under more placid and peaceful circumstances.
>
> And so the degree of force actually used by the defendant should not be appraised by you from the standpoint of one who has the leisure . . . to make a calm, unhurried judgment. The conduct of the parties at the moment of conflict should be evaluated by you from their prospective at that time, and in light of the judgment of which they were then reasonably capable.

N.T. at 7.33-34. *Cf:* New Jersey Model Charge §3.10(B). This charge was appropriate for the jury's assessment of whether the force used by Dixon was reasonable assuming his version of the incident. The caselaw is replete with references to the amount of force which *appeared necessary,* taking *into account all of the circumstances. See e.g., State v. Black,* 86 N.J.L. 520, 524, 93 A. 91 (Sup. Ct. 1915); *Hagopian v. Fuchs,* 66 N.J. Super. 374, 382, 169 A.2d 172, 176 (1961); *State v. Goldberg,* 12 N.J. Super. 293, 307, 79 A.2d 702, 709 (1951). Thus, plaintiff's suggestion that this charge was not supported by the caselaw and was inapposite in the context of an intentional tort must be rejected. The instruction given was simply part of the self-defense charge, not relating to the negligence principle referred to by plaintiff as the emergency doctrine. Further, the jury was instructed that the defendant had the burden of proving that plaintiff's injuries were caused by the security guards acting in self-defense. (N.T. 1.32).

c. Mere Words

Plaintiff next assails the court's failure to charge that "mere words or gestures will not justify an assault and battery." I did not give the jury this instruction as it was not factually appropriate and might have been unduly confusing. Simone's foul language was not the alleged provocation for the mere touching incidental to escorting him from the premises. It may, in part, have led to his being considered a "disorderly person." This, in turn, may have given the casino a right to ask him to leave or to have him evicted. Since a mere touching could be an assault and battery, yet could have been justified for reasonable ejectment purposes, the court was careful not to instruct the jury that no matter how verbally abusive a patron may be, a tavern owner would be without justification in merely touching the patron to escort him from the premises. Moreover, since this entire chain of events was premised, in part, upon Simone's initial behavior, the instruction might have given the jury the erroneous impression that they could not consider Simone's language for any purpose. I offered to give the instruction to accommodate plaintiff's concerns, but indicated that I would also give a balancing instruction with respect to disorderly persons. (*See* N.T. at 7.87-88). Since that compromise was not satisfactory to plaintiff, no instruction was given. Moreover, defendant never argued that mere words or gestures provoked the physical attack from which plaintiff claimed injury, hence the charge was unnecessary. I stand by my original ruling (*see* N.T. at 7.88) that there was no confusion in the minds of the members of the jury. Finally, this contention must be rejected because plaintiff never raised it in his points for charge.

d. Agency

Plaintiff challenges that portion of the charge instructing that he bears the burden of proving that the

employees of defendant were acting within the scope of their employment. Plaintiff contends that the evidence of agency was undisputed and argues that the charge "left the impression that when it came to the use of physical force by defendant's agents something more specific was required." Brief in Support of Plaintiff's Post Trial Motions at 10. In the absence of a stipulation, the agency issue was open for the jury's determination and plaintiff was not relieved of the burden of proof. Moreover, as defendant points out, plaintiff was victorious on two other claims. Thus, the jury found lacking some element, other than the agency, in finding that there was no assault and battery. With respect to the argument that the charge made it seem that "something more specific was required," I am frankly perplexed. The agency charge applied to all claims and no inference arose that any greater quantuum of proof was required when assault and battery was at issue.

e. Defiant Trespasser

Plaintiff contends that the court erred in charging the jury on the definition of a "defiant trespasser," arguing that the instruction was prejudicial as well as factually inapposite. This exception is raised in the motion for a new trial on assault and battery. However, the "offending language" is found in that section of the charge relating to false imprisonment.[6] Since the jury found in

6. *See* the false imprisonment charge, *infra* at note 7. The specific section plaintiff refers to reads:

> Going back a moment to the claim of false imprisonment, and the casino's contention that there was justification, you are instructed that under New Jersey law, that the definition of defiant trespasser is one who comes onto the property of another knowing that he does not have the right or privilege of doing so, and where that fact has been communicated to him by some actual communication, or some other means of communication which that person reasonably would actually see or come to know.

N.T. at 7.35.

plaintiff's favor on the false imprisonment issue, any error in the charge could not have prejudiced Simone.

Defendant did not argue, nor did the charge suggest, that Simone was a defiant trespasser on the night in question. In order to fall into that category, an individual would have to be evicted from the casino initially, with notice that he was no longer welcome and return in spite of that notice. Upon his return, he could be arrested as a defiant trespasser. Defendant argued that it had a right and a duty to evict disorderly persons, giving them the requisite notice that upon return they would be deemed defiant trespassers. Crediting defendant's testimony, there was evidence that plaintiff was a disorderly person who refused to leave the premises when first asked. The decision was then made to employ the formal eviction procedure, at which time plaintiff would be advised that if he returned, he would be subject to arrest as a defiant trespasser. Defendant contended that it was reasonable to take steps to read plaintiff the prepared statement and attempt to take his photograph for future identification. Defendant was not attempting to characterize Simone as a defiant treapasser. Rather, it was endeavoring to justify its detention of plaintiff as a reasonable and necessary security measure — not a false imprisonment. Therefore, I conclude that the charge was appropriate.

3. Evidentiary Rulings

Finally, plaintiff asserts that the court erred in allowing the defendant to introduce evidence through a pit boss that one of the evicted patrons had been disorderly at his black-jack table and that this conduct prompted his call to security in the first instance. This evidence supported the casino's explanation of how Dixon came to be in the area and was admitted for background purposes only. The jury was so instructed and was also told that plaintiff was not one of the three men being escorted from the casino by Dixon because of dis-

orderly conduct. This laid the foundation for Dixon's testimony that he was escorting the three unruly patrons from the casino when Simone appeared, verbally abused him and interfered with the eviction of the others. Thereafter, on cross-examination, plaintiff's attorney, knowing that the casino witness had previously misidentified one of the unruly patrons as Simone, elicited the witness' identification recollection. Not only was the background evidence relevant and admissible as non-hearsay, but any prejudice of which plaintiff now complains was totally self-inflicted. For these reasons, plaintiff's objections as to the verdict in favor of defendant on the assault and battery claim are rejected and his motions for judgment n.o.v. or, alternatively, a new trial, are denied.

B. False Imprisonment

The jury found in favor of plaintiff on the false imprisonment claim. In moving for a judgment notwithstanding the verdict or a new trial, defendant argues that the jury's verdict is inconsistent and that the casino had a duty to remove Simone, thus justifying the detention. Defendant also challenges a minor evidentiary ruling. Both parties take issue with the damages portion of the jury instructions. The court finds the evidence sufficient to support the jury's conclusion on liability, but agrees that there was error in the charge[7] as to damages. Accordingly, a new trial shall be ordered on this count.

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7. The court charged as to false imprisonment:

Now, I'm going to turn my attention to the principles of law associated with false imprisonment. Keep in mind, false imprisonment is a separate claim, and there are separate elements for it.

False imprisonment is the unlawful detention of an individual. In this context, the word "detention" means the unlawful restraint on a person's personal property liberty or freedom of movement, and the word "unlawful" means without legal authority. Such unlawful restraint may result from actual force or by threats consisting of word or conduct which induce or cause

1. Inconsistency in the Verdict

Defendant maintains that there is an inherent inconsistency in the jury's finding in favor of the plaintiff on false imprisonment and in favor of the defendant on assault and battery. Defendant argues that the jury's determination that there was no assault and battery also implies a finding by the jury that all touching of the plaintiff was justified. Since plaintiff complained only of false imprisonment by physical restraint, and the jury found all touching justified, defendant maintains that a

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a reasonable apprehension of force. Apprehension is another word for belief that force is going to be used.

The unlawful detention need not be for more than an appreciable length of time, as even a brief restraint of a person's freedom is sufficient to constitute false imprisonment.

The restraint must be against the plaintiff's will. If he agreed of his own free choice to surrender his freedom of motion, or personal liberty, there is no false imprisonment. To constitute a false imprisonment, the act of the defendant in confining the plaintiff must have been done with the intention of causing a confinement.

If there were a purely accidental confinement, or a confinement because of — strike that. If there's a purely accidental confinement without the intent to confine, there can be no false imprisonment. Likewise, if there were a confinement due to the negligence of a defendant, there could not be false imprisonment.

So there must be an intent on the part of the confining defendant to cause the confinement.

It is not a necessary ingredient in this cause of action that the defendant be motivated by malice in the sense of ill will or desire to injure. If there is an unlawful detention against a person's will, — strike it. If there is an intentional confinement against the person's will and without legal authority, then there is false imprisonment even though there may not have been actual malice.

The defendant claims that it had justification for confining or attempting to confine the plaintiff.

The plaintiff denies that at any time he exhibited any conduct which gave just cause to the casino personnel to ask him to leave the premises or to restrain him in any way in terms of his movement.

judgment notwithstanding the verdict is compelled. Although this reasoning has a facial appeal, the argument goes both ways. Plaintiff could assert that the finding of false imprisonment, by necessity, means that there were some unlawful touching during its course and that judgment should, therefore, be directed in its favor as to assault and battery. Both arguments miss the mark. There are several possible conclusions that the jury could have reached consistent with the verdicts returned. It must

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Note — *(Continued)*

A proprietor of a place of amusement has the common law right to exclude from the premises persons whose actions disrupt the regular and essential operations of the premises or business, persons who threaten security of the premises or the occupants, and there is a duty under law, common law principles, to bar from the entire facility persons who are disorderly, intoxicated or a repetitive petty offender. However, property owners who open their premises to the general public in pursuit of their own property interest, have no right to exclude persons unreasonably. So a property owner may use only such means as are reasonable and those means if reasonable may continue only for the amount of time that an ordinarily cautious person under the circumstances would take or use to effectuate a lawful purpose.

Here you heard the evidence as to what the casino claims was the basis for its actions as to Mr. Simone, and I believe you've also heard testimony as to what it claimed its purpose was.

Whether a decision to exclude in the first instance is reasonable or not must be determined from the facts of each case. If there was justification, the inquiry cannot end there. The jury would also have to determine whether the restraint or confinement was unreasonable, and whether it continued for an unreasonable period of time. So even if there was justification but the restraint or method employed were unreasonable or continued for an unreasonable period of time, then you'd have to find for the plaintiff.

A person — strike that. The casino defendant claims that there was justification in the decision to exclude Mr. Simone because of certain actions which have been alleged. A proprietor of a place of amusement does have the power or duty to exclude reasonably, using reasonable means, persons who are disorderly. If a person in a public place engages in language or

be remembered that the jury was not specifically asked when the false imprisonment began. More important is the fact that the elements of assault and battery and false imprisonment are not identical. False imprisonment is the unlawful or unjustified detention of someone against his will. A touching or other physical contact, the essence of assault and battery, is not a required element of false imprisonment. The jury could have found that after the point at which Simone and his con-

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actions with the purpose to offend the sensibilities of a hearer or in reckless disregard of the probability of so doing or addresses in an unreasonably loud and offensively coarse or abusive language, the person may be considered to be disorderly, and you'd have to consider the circumstances and the setting of the utterance or action.

So you have to decide whether or not under the evidence there was justification for the initial decision by the casino to exclude Mr. Simone and whether or not — well, if there was no justification, and he was intentionally confined thereafter, you would have to find in his favor. If you find there was justification for the initial action, or for any other subsequent lawful purpose, you would still have to determine whether or not reasonable means were employed for a reasonable period of time to effectuate the lawful purpose. If not, then you'd have to find for the plaintiff. . . .

If you find that the defendant is liable for false imprisonment, you must determine whether or not that false imprisonment was a proximate cause of the injuries for which the plaintiff complains. Proximate cause is that which in the natural and continuous sequence, unbroken by any new cause, produces an event and without which the event would not occur. Even if there was false imprisonment, if the false imprisonment was not a proximate cause of the injuries complained of, there could not be any recovery for compensatory damages.

If you find that the false imprisonment was a proximate cause of the plaintiff's injuries, he would be entitled to a verdict for compensatory damages in such amount as would constitute reasonable compensation for loss of time, any physical injuries sustained by him, and for mental and emotional stress resulting from the indignity to which he was subjected.

So in assessing compensatory damages, if you get to that stage, you should consider whether the act of the defendant in falsely imprisoning the plaintiff — strike that.

federates offered to leave the casino, their continued detention was unlawful or unjustified. The absence of an unjustified touching will not defeat a false imprisonment claim. In addition, the jury was at liberty to decide that although the detention was unlawful, it did not justify Simone's shoving of the security guards.[8]

Alternatively, the jury could have found that the false imprisonment began as soon as Long directed the guards to take Simone along with the others. Any physical touching that occurred thereafter could have been considered part and parcel of the false imprisonment, and may have been compensated as such. Put another way, the jury could have found no assault and battery apart from whatever unlawful touching occurred during the false imprisonment.[9] Therefore, I find no inconsistency in the jury's verdict.

2. Duty to Remove

In the alternative, defendant contends that the casino had a right or even a duty to remove disorderly per-

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Note — *(Continued)*

> You have to decide relative to compensatory damages, if any, what injuries or harm in fact were cause by the false imprisonment to the plaintiff. . . .
>
> Going back a moment to the claim of false imprisonment, and the casino's contention that there was justification, you are instructed that under New Jersey law, that the definition of defiant trespasser is one who comes onto the property of another knowing that he does not have the right or privilege of doing so, and where the fact has been communicated to him by some actual communication, or some other means of communication which that person reasonably would actually see or come to know.

N.T. at 7.24-28; 7.35.

8. The jury also could have determined that the assault and battery was not attributable to the casino because the security guards acted beyond the scope of reasonably anticipated activity in manhandling plaintiff. Simone's detention, on the other hand, fits more comfortably into the foreseeable scope of their authority.

9. This may explain the award of $150,000.00 in compensatory damages in light of the finding of no assault and battery. A claim for false imprisonment alone is sufficient to compensate a plaintiff for physical injuries which occur during its course.

sons under *Uston v. Resorts International Hotel, Inc.*, 89 N.J. 163, 445 A.2d 370 (1982). However, that does not, as a matter of law, justify plaintiff's detention if he offered or tried to leave the premises. The jury could have found that it was proper for the casino to ask Simone to leave and even to escort him out. However, the jury could have determined that the casino crossed the boundaries of reasonableness when it, nevertheless, insisted upon taking him and the others to the security office after they offered to leave.

The defendant argues that the court erred in failing to instruct the jury that casinos have a duty to exclude or eject persons known to them "[w]hose presence in a licensed casino would, in the opinion of the Commission, be inimical to the interest of the State of New Jersey or of licensed gaming. . . ." This proposed point for charge tracks the Casino Control Act, N.J. Stat. Ann. tit. 5 §12-71 (West 1973), a statutory provision granting the Casino Control Commission authority to determine classes of persons whose presence would be "inimical to . . . licensed casino gaming." However, defendant cannot cite any regulations promulgated by the Commission which designate classes of persons to be excluded. Since the Commission has not acted, charging the jury on this enabling statute would have been inappropriate. Moreover, if the Commission had promulgated regulations which covered Simone's conduct, there might still be a factual issue as to whether those regulations were carried out in a reasonable manner.

3. Evidentiary Rulings

Relying upon *Driscoll v. Schmitt*, 649 F.2d 631 (8th Cir. 1981), defendant argues that the court erred in precluding the testimony of Atlantic City police officers with respect to Simone's belligerent conduct after being taken into custody. Defendant maintains that Simone's conduct outside of the casino would have been probative of his earlier conduct in the casino. That logical leap

simply does not follow. Simone could have been quiet and orderly in the casino, but his ire may have been sparked by any or all of the events which occurred at the hands of the casino guards, culminating in his being handed over to the police. His belligerence may have begun at any time after his detention in the casino. His subsequent behavior in police custody does not tend to prove that he had been disorderly in the casino, thus supporting the casino's decision to evict him. Simone admits cursing outside the casino as he was being restrained by the security guards and then as he was being arrested. In *Driscoll*, the person did not admit to obstreperous behavior and the testimony was admitted for impeachment purposes. Given Simone's admission, there was no impeachment purpose to be served. Finally, testimony about what happended outside the casino *was* permitted up to the point when the police actually assumed custody. Therefore, I can conceive of no possible prejudice to defendant resulting from limiting the testimony to the pre-custody period.

4. Damages

Both plaintiff and defendant contend that the court erred in the admission or exclusion of certain evidence at trial and that it also erred in the charge as to future losses. These objections become very relevant since the award for false imprisonment may have included compensation for some or all of plaintiff's physical injuries, *see* note 9, *supra*.

a. Future Medical Expenses

Plaintiff maintains that the court erred in instructing the jury that an award for future medical expenses should be based upon a "reasonable degree of certainty" as opposed to a "reasonable probability." On reflection, the court agrees that it would have been more correct to have charged as plaintiff requested. I was initially of the

opinion that the difference between reasonable degree of certainty and reasonable probability was not so material as to warrant a new trial. The word "certainty" means "to be sure" or "without a doubt." Here, the word was modified by the phrase "reasonable degree of." Therefore, the jury was left with the standard of "reasonably sure" for assessing future medical expenses. The word "probability" connotes something that is "likely to occur." New Jersey defines reasonable probability as "evidence in quality sufficient to generate a belief that the tendered hypothesis is in all human likelihood the fact." *Ayers v. Jackson Township*, 189 N.J. Super. 561, 567, 461 A.2d 184, 187 (1983) (citing, *Ciuba v. Irvington Varnish Insulator Co.*, 27 N.J. 127, 139, 141 A.2d 761, 767 (1958)). In *Budden v. Goldstein*, 43 N.J. Super. 340, 128 A.2d 730 (App. Div. 1957), the court stated:

> Our cases do not seem to have dealt specifically with the question of whether the two, ['reasonable certainty' and 'reasonable probability'] have the same significance in relation to *quantum* of proof, and so may be used interchangeably. It seems to us in a resolution of the conflicting interests involved, reasonable probability is the just yardstick to be applied.

Id. at 347, 128 A.2d at 734. Although the question is a close one, *Budden* indicates that "reasonable probability" is the appropriate standard. There may be a modicum of difference between "reasonably sure to occur" and "reasonably likely to occur" that could have made a real difference in the jury's evaluation of the evidence. For this reason, plaintiff's exceptions are granted and a new trial is ordered. A trial on damages alone would not suffice since it cannot be determined from the jury's responses what physical injuries, if any, were awarded for the claim of false imprisonment. Upon retrial of the false imprisonment claim, all physical and mental injuries

which allegedly occurred during the detention will be at issue.

Each party raises a specific objection to the testimony of plaintiff's medical expert, Dr. Simon. Plaintiff complains because Dr. Simon was not permitted to testify about the costs of future back surgery and defendant complains because Dr. Simon was permitted to testify about the risks of such surgery. On balance, I conclude that all testimony relative to the surgery should have been excluded.

Dr. Simon indicated that surgery would only be warranted if plaintiff became a paralyzed cripple, unable to function in his daily life. (N.T. at 3.58, 3.67, 3.70). However, he could not formulate an opinion on whether Simone's symptoms would worsen. Indeed, there was no medical evidence that plaintiff's condition had worsened or was likely to worsen. I excluded testimony about the cost of this future surgery, as it was speculative. I stand by that ruling. The standard of "reasonable probability," although more liberal than "reasonable certainty," is not a license to admit as evidence speculation and conjecture. The same reasoning applies with respect to the risks of the surgery. There was no indication that it was "reasonably probable" that this surgery would be necessary. Therefore, it was an error for the court to have allowed such testimony.

b. Future Loss of Earning Capacity

Defendant characterizes my charge on future loss of earning capacity as a call to the jury to apply a mathematical formula to the calculation of damages. I disagree. The jury was free to consider all relevant factors known about the plaintiff and his earning potential. The instructions indicated that the jury was not bound by past earnings and that the loss could lessen or increase

in the future.[10] The instruction was appropriate and defendant's exception must be rejected.

C. Malicious Prosecution

Plaintiff contends that the jury's finding that there was no malicious prosecution should be set aside because of lack of evidence of probable cause, error in the

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10. The charge reads:

> The plaintiff also claims a future loss of earning capacity by reason of a condition which he claims to be permanent, and caused by the actions of the defendant. Loss of earning capacity is a concept of deciding — is a concept by which one determines whether a plaintiff's earning horizons have been lowered or lessened by reason of a tort or a wrong done by the defendant. It is not necessarily controlled by one's past earnings. That's a factor to be considered, but the jury may properly consider the person's age, person's occupation, the person's health before the accident or incident, and everything else about the person that is shown by the evidence in deciding what was that person's earning capacity prior to the accident or incident. And what it is now after the incident.
>
> Let's suppose that you found that there was a difference of X. That would be a loss of earning capacity. You look at what the person had in the way of earning potential before and what the person's potential in terms of earning ability is now. And if the evidence shows that — if you have evidence to do that and were satisfied that there is a difference, then you have to decide how long in to the future that person's loss will exist. It may lessen or it may increase, depending upon the evidence. If you are persuaded, then you would multiply the difference times the period of time that you believe it will continue. And that sum, that result would be the person's loss of earning capacity.
>
> There's no stipulation in this record as to how long Mr. Simone would be able to work as an attorney. And you'll have to recall the evidence as to whether he testified about how long he intended to work as an attorney. And if he did so testify, then you will have to decide how long he would reasonably work as an attorney in deciding what his loss of earnings capacity would be.
>
> There is no mandatory retirement age for an attorney, at least not as a private practitioner.

N.T. at 7.40-41.

charge and evidentiary rulings at trial. For the reasons which follow, the court finds that the verdict entered in favor of defendant on this count must stand.

1. Agency

Plaintiff contends that the court erred in refusing to charge the jury that the casino was responsible for the initiation of criminal charges against Simone. The jury was told that charges were brought against Simone and that "the plaintiff must establish that the defendant was responsible for or caused that proceeding to be instituted against him." N.T. at 7.19.[11] Since Dixon and Palmieri pressed charges upon the instruction of Captain Long,

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11. The full charge reads:

The plaintiff claims that there was a malicious prosecution based upon the evidence in the case. The first element is that the plaintiff must establish that there was a criminal judicial proceeding brought against him. There was a criminal judicial proceeding in fact brought against him. You have to decide whether or not the defendant caused those charges to be brought against him under the evidence in the case. That is the second element, that is, that the plaintiff must establish that the defendant was responsible for or caused that proceeding to be instituted against him.

The third element is that the plaintiff must establish that the criminal proceeding terminated favorably to him. Here I instruct you that the criminal proceeding, which was entitled "Commonwealth v. Simone," did terminate favorably to the plaintiff. You are not to speculate as to what reasons may have been advanced by the court in that matter for terminating the proceeding favorably to the plaintiff.

The fourth element is that the plaintiff must establish that there was a lack of probable or reasonable cause for the criminal prosecution. The plaintiff contends that there was a lack of reasonable or probable cause, and the defendant contends that there was reasonable or probable cause for instituting the criminal action against the plaintiff.

In cases of criminal prosecution, reasonable or probable cause exists where there are reasonable grounds for suspicion or belief that an offense was committed, and there are circum-

Simone argues that they were necessarily acting on behalf of the casino in filing the allegedly false charges. I disagree. Although Long did tell Dixon and Palmieri to file the complaints, there was no evidence that he told them what to say. Certainly, there was no evidence that Long directed them to file *false* charges. Assuming arguendo that the charges were false, plaintiff still had the burden of proving that it was the casino who was responsible for their initiation. The jury could have found that the individual security guards were at fault. From the casino's perspective, Dixon and Palmieri may have related to the police a truthful account of the events. Plaintiff is simply mistaken that every consciously criminal or tortious act committed by an employee during employee time is automatically attributable to an employer

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Note — *(Continued)*

> stances sufficiently strong in themselves to warrant an ordinarily cautious person to believe that the accused committed it. However, conjecture or unfounded suspicion do not constitute reasonable or probable cause.
>
> Whether probable cause existed does not depend upon a consideration of what the facts actually were but rather upon a consideration of what the facts were as they appeared to or were known by or were believed to be by the defendant when he instituted the criminal proceedings against the plaintiff.
>
> So it is not necessary that a defendant have actual cause to prosecute the plaintiff. It is necessary only that there be reasonable or probable cause for doing so.
>
> If you find that the defendant brought the charges and had reasonable or probable cause to believe the plaintiff was guilty of the charge, it is immaterial that the plaintiff was in fact innocent. Even if you believe the plaintiff was innocent of the crime, he cannot recover if you find that the defendant had reasonable or probable cause to believe that he was guilty. Nor can you draw an inference of lack of reasonable or probable cause just because the criminal prosecution ended favorably to the plaintiff.
>
> On the other hand, if you find that the defendant did bring the charges, and did not have an honest belief that the plaintiff was guilty, and the charges were thereby falsely brought, you must conclude there was no reasonable or probable cause.

under the doctrine of *respondeat superior*. An employer can be liable for such acts under this doctrine *only* where they are done "for the master's purposes or reasonably expectable by the latter." *Roth v. First National State Bank*, 169 N.J. Super. 280, 286, 404 A.2d 1182, 1185 (App. Div. 1979) *cert. denied*, 81 N.J. 338 (1979). Plaintiff did not undertake to offer any evidence, direct or circumstantial, that the casino's business purposes were served by causing false charges to be filed or that the filing of false charges by the security guards was the kind of conduct reasonably forseeable by the casino. Therefore, any refusal to direct the jury that the casino filed the charges was appropriate.

Note — *(Continued)*

> You've heard the testimony as to what were the charges and how they were made and under what circumstances and so forth, and I will not repeat any of that. It is for you to determine and recall what were the charges and decide under this whether or not there was probable cause.
> The fifth element is that the plaintiff must establish that the defendant was activated by a malicious motive in prosecuting the criminal complaint against him. The malice contemplated by this element is not malice in the sense of the word as it is sometimes used. The kind of malice I speak of means the intentional doing of a wrongful or unlawful act without just cause or excuse. Such malice is an intentional act which an ordinarily cautious man or woman would realize that under ordinary circumstances damages would result to one's person or property, and which does in fact damage another person or property.
> The element of malice may be inferred from a lack of probable cause.
> The sixth element which the plaintiff must show is that assuming he has met each of the five preceding requirements, he must show, in order to recover, that what was done was a proximate cause of some damage claimed by him. In other words, the plaintiff must show that any damage or harm was a proximate result of the malicious prosecution.
> Proximate cause is sometimes referred to or may sometimes be referred to by me as a substantial factor, that is, that assuming a person suffered harm, then that person would have the bur-

2. Probable Cause

Plaintiff argues that inaccuracies in the formal charges render them false, thus depriving the casino of probable cause for the institution of criminal proceedings. If the casino had no probable cause, plaintiff reasons, a verdict should have been directed in his favor on this count. The formal police complaint indicated that Simone struck the guards about the face and body. Dixon and Palmieri admitted that this is not accurate. They testified at the preliminary hearing and before this court that Simone pushed them in or about the chest area. Moreover, they contended that their handwritten statements to the police were consistent with this testimony. The formal complaints were signed in blank, as was the alleged practice, permitting the police to fill in the formal charging language out of the complaintant's presence. I reject plaintiff's contention that inaccuracies in the guards' formal complaints automatically deprives

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Note — *(Continued)*

den of showing by a fair preponderance of the evidence that the damage was caused in some real way by the wrongful act. That does not mean that that may have been the only cause, but there must be shown that the claim claimed or proven wrongful action was a proximate cause or a substantial factor in bringing about the damage suffered.

So I'll go through those six elements again. The plaintiff first must establish the existence of a criminal judicial proceeding against him.

Second, the plaintiff must establish that the defendant was responsible for or caused the proceeding to be instituted against him.

The third, the plaintiff must establish that the criminal proceeding terminated favorably to him.

Fourth, the plaintiff must establish a lack of reasonable or probable cause for the criminal prosecution.

Fifth, plaintiff must establish that the defendant was activated by a malicious motive in prosecuting the criminal complaint against him.

Sixth, the plaintiff must show that if he sustained any damage, that it was a proximate result of malicious prosecution.

the casino of probable cause. Crediting the guards' testimony, Simone's shove in the chest could have been found sufficient to give them probable cause for the filing of the complaint. The jury could have determined that the inaccuracy arose when police personnel filled in the formal charging language. Moreover, since the guards corrected the inaccuracy at the preliminary hearing, Simone was only required to defend against the pushing incidents. Therefore, the evidence does not compel a finding that probable cause was lacking.

3. The Charge on the New Jersey Statute

Plaintiff faults the court for charging that under New Jersey law "it is a violation to strike, kick, shove or engage in any offensive touching or threatening to do so." N.T. at 7.22-.23. *See* N.J. Stat. Ann. tit. 2C §33-4(b) (1982). Plaintiff maintains that this was an improper addition to the malicious prosecution instruction because

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Note — *(Continued)*

> Under New Jersey law it is a violation to strike, kick, shove or engage in any offensive touching or threatening to do so.
> With respect to the malicious prosecution claim, the plaintiff claims damages for any actions of the Golden Nugget which caused him to be placed under arrest, to be held by the Atlantic City police, and to have to stand trial to defend against the criminal charge brought.
> The claims for any inconvenience associated with that, any value attributable to a loss of his liberty during the period of time that he was in jail, and any mental anguish or embarrassment associated with that process.
> You heard some testimony in this case pertaining to activities between Mr. Simone and the police or the police and Mr. Simone, as well as, I believe, something about a charge brought by some policeman against Mr. Simone and the disposition of that. You are to disregard for all purposes anything about Mr. Simone's alleged — any testimony about Mr. Simone's activities with the police or the police with Mr. Simone. That is not in the case and it's out. So you must be careful to disregard it and give it no weight or effect whatsoever.

N.T. at 7.18-.23.

Simone was not charged with violating that statute, nor did the guards intend to so charge him. However, plaintiff unintentionally rebuts his own argument, stating "[t]he only possible effect of this instruction was to suggest some basis to support the filing of the criminal complaints by the defendant." Plaintiff's Brief in Support of Post-Trial Motions at 15. At the risk of belaboring the obvious, the fact that shoving another is violative of the law is probative of the guards' probable cause for filing the complaints. Therefore, the inclusion of this language in the charge was entirely proper.

4. Defendant's Opening Statement

At oral argument on the post-trial motions, plaintiff raised a contention not included in his post-trial motions or supporting briefs. Since the exception was not raised in a timely manner, it cannot be treated as the basis for new trial as to malicious prosecution. However, the court will address this objection because it was the basis of a motion for mistrial made during defendant's opening statement. When made, plaintiff's motion sought withdrawal of jurors as to *all* issues, not just the malicious prosecution count, so plaintiff cannot now have the motion apply selectively. If granted, the motion would apply to all triable issues, not just malicious prosecution.

In his opening statement, defense counsel told the jury that in addition to having been charged with simple assault by the security guards, Simone had been charged with assault and battery by one of the Atlantic City policemen. Although he was found not guilty of assault and battery, defense counsel stated that he thought Simone was found guilty of being a disorderly person. It was this comment that gave rise to the motion for a mistrial. The motion was denied[12] and the jury was immedi-

12. Defense counsel's statement must be understood in the context of the claims for damages then in the case. In addition to

ately instructed "what Mr. Simone was found guilty of or not guilty of will be disregarded by the jury." Opening Statement of Defense at 7. At oral argument on the post-trial motions, plaintiff explained how his objection to this comment related to the malicious prosecution claim. One of the elements of malicious prosecution is the termination of the criminal proceedings favorable to the plaintiff. He feared that the statement that Simone was thought to have been found guilty of being a disorderly person would lead the jury to think that the proceedings had not terminated in his favor. *See* Transcript of Oral Argument on Post-Trial Motions at 16. This argument ignores the instructions given to the jury. In addition to the immediate curative instruction quoted above, I advised the jury that the statements of counsel were not evidence. N.T. at 1.8. After a side-bar discussion, the jury was told that plaintiff was acquitted of the charges brought by defendant or its agents. N.T. at 1.32. Most importantly, in my final charge, the jury was instructed

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the injuries allegedly suffered at the hands of the casino security guards, plaintiff was also proceeding against the casino for injuries inflicted by the Atlantic City police after his arrest. These items included an injury to his head, allegedly caused by the police banging his head against a table, an injury to his wrist caused by the twisting of the handcuffs and other bruises or abrasions to his body. Plaintiff also claimed entitlement to the attorney's fees incurred in his defense of the police initiated criminal charges. Although claims for police caused injuries were withdrawn during the trial, they were very much a part of plaintiff's case when the trial began, as evidenced by plaintiff's opening statement. (*See* N.T. at 1.17-1.18; 1.24). Since Simone was endeavoring to hold the casino responsible for the police inflicted injuries, defense counsel's comment was viewed as an attempt to show that the police were not without probable cause in their treatment of Simone and that he was in fact the aggressor. To the extent that plaintiff had "opened the door," the motion for mistrial was denied. At the close of the evidence, the jury was instructed that the "police damage" issues were out of the case and directed to disregard any and all reference to testimony pertaining to the post-arrest charges and confrontations between Simone and the police, *inter se*.

that the criminal complaints filed by the casino guards were terminated favorably to the plaintiff. N.T. at 7.19. In light of these repeated directions, I find that the comment did not mislead or prejudice the jury in their deliberations on malicious prosecution.

D. ABUSE OF PROCESS

Defendant seeks a judgment notwithstanding the verdict on the abuse of process claim, arguing once again that the jury's verdict is inconsistent. The determination that there was no malicious prosecution necessarily entails a finding that the criminal charges were initiated without malice and with probable cause. Defendant reasons that the existence of probable cause or the absence of malice defeats a claim for abuse of process. I agree.

The essence of this tort is the perversion of the legal process — using it for a purpose other than that which it was designed to accomplish. *See e.g., Ash v. Cohn*, 119 N.J.L. 54, 58, 194 A. 174, 176 (E. & A. 1937); *Fielder Agency v. Eldan Const. Corp.*, 152 N.J. Super. 344, 348, 377 A.2d 1220, 1222 (1977); *Gambocz v. Apel*, 102 N.J. Super. 123, 128-30, 245 A.2d 507, 509 (App. Div.), *cert. denied*, 52 N.J. 485, 246 A.2d 447 (1968). *See also Prosser on Torts*, Chap. 22, §121 at 856-57 (4th ed. 1971). Abuse of process consists of two elements — the improper or unwarranted use of the legal process accompanied by an ulterior motive.[13] It is this ulterior motive

13. The abuse of process charge, to which neither party excepted, sets out the elements of the tort under New Jersey law.

> Abuse of process. Abuse of process is separate from malicious prosecution or false imprisonment. The plaintiff in this action alleges that the defendant is liable for abuse of process. The defendant denies the allegation. There are two basic elements necessary to sustain the cause of action of abuse of process. They are:
>
> 1. That the defendant made an improper, illegal and perverted use of the legal procedure. That is to say, his resort to the legal process was neither warranted nor authorized by law;

which distinguishes abuse of process from malicious prosecution. As Prosser explained; "if the defendant prosecutes an innocent plaintiff for a crime without rea-

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And 2. That the defendant had an ulterior motive in initiating the legal process. In other words, abuse of process is the misuse or misapplication of the legal procedure in a manner not contemplated by law. In other words, here the plaintiff contends that the defendant invoked the legal process against him to accomplish some unlawful end; namely, — well, to accomplish some unlawful end. You'll have to decide from the evidence what the plaintiff claims the ulterior motive to have been. And whether or not the proof satisfies you that it was shown.

The defendant denies the allegation and asserts that he or it made a regular and legitimate use of the process. So the plaintiff, to prevail in this action, must prove by a preponderance of the evidence that the defendant made an improper, illegal and perverted use of the legal process, and that there existed an ulterior motive or purpose on the part of the defendant.

If you find that the use of the legal process was a proper one, then I charge you as a matter of law that the motive is immaterial.

The legal pursuits of one's rights, no matter what may be the motive of the promoter of the action, cannot be deemed illegal or inequitable. It is the misuse of the process through properly obtained which constitutes the misconduct for which liability is imposed.

If you find, therefore, that the defendant made a perverted use of a legal procedure for which it was not designed with an ulterior purpose, then I charge you as a matter of law the law provides a redress, and the defendant would be liable to the plaintiff.

With respect to abuse of process, it is immaterial whether or not the defendant in initiating the action, if the defendant did, was without probable or reasonable cause, or whether there was ill will or dislike of the plaintiff.

The issue is whether or not there was a misuse and illegal or perverted use of the legal process with an ulterior motive.

As with the other two claims here again, there must be proof not only that there was abuse of process, but that the abuse of process was a proximate cause in bringing about any harm to the plaintiff for which he claims. Here the plaintiff claims that the legal process was abused commencing with his being turned over to the Atlantic City police. And you heard the var-

sonable grounds to believe him guilty, it is malicious prosecution; if he prosecutes him with such grounds to extort payment of a debt, it is abuse of process." *Prosser on Torts*, Chap. 22 §121 at 857. Therefore, both torts require a lack of probable cause — abuse of process adds the further element of an ulterior motive. The jury's finding of probable cause implicit in the malicious prosecution verdict would therefore also defeat a claim for abuse of process.

The jury's verdict could reflect a determination that there was probable cause for the institution of the criminal proceedings, but not for the continuing prosecution of inaccurate charges. That is, the jury might have penalized the casino for the discrepancy between a hit in the face and a shove in the chest. A finding of abuse of process for this inaccuracy is impermissible. As a factual matter, there was no evidence that the casino was aware of the discrepancy prior to the preliminary hearing, at which time the guards corrected any inaccuracy.[14] Since the inaccuracy was corrected at that early stage, it cannot be said that the casino continued to prosecute false charges. Moreover, a discrepancy in the charge does not alter the fact that the legal process was properly

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Note — *(Continued)*

> ious contentions of the parties with respect to who filed the charges, what were the charges, how they were filed, and you've heard the contentions with respect to how they were processed.
>
> So you have to decide here whether or not there was an abuse of the legal process and whether also there was an ulterior motive. If the process, if the legal process was properly invoked, then you go no further.
>
> If it was misused, then you also have to determine whether or not there was an ulterior motive. The plaintiff must prove both prongs.

N.T. at 7.28-.31. *Cf.* N.J. Model Jury Charges §3.19.

14. Had the formal charges been consistent with the guards' testimony, Simone would still have had to be present at the preliminary hearing to defend against the lesser assault.

invoked and utilized only for the purpose that it was designed to accomplish.

There is a futher ground for granting defendant's motion for judgment notwithstanding the verdict. Plaintiff failed to articulate or prove the rquired ulterior motive.[15] As the court stated in *Earl v. Winne*, 34 N.J. Super. 605, 112 A.2d 791, 797 (1955):

> A cause of action for malicious abuse of criminal process may not be sustained without proof of a vexatious, oppressive, unlawful, threatening or coercive act by deed, word or writing addressed to the plaintiff by the defendant, directly or indirectly, by agent or emissary sufficient to compel or extort the plaintiff against his own free will, to do or perform an act he otherwise would not have done or to refrain from the free exercise of his civil rights while the criminal process is pending.

34 N.J. Super. at 616, 112 A.2d at 796. Plaintiff failed to produce any evidence of coercive or oppressive acts which would represent a "perversion of the legitimate use of the process." *Fiedler*, 152 N.J. Super. at 348, 377 A.2d at 1222. Therefore, plaintiff did not satisfy his burden of proof as to the second element of his abuse of process claim and it was error to have submitted this count to the jury. Accordingly, judgment must be entered in favor of defendant.

E. DAMAGES

Defendant challenges the jury's award of both compensatory and punitive damages on a number of

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15. In his brief, plaintiff suggests that the requisite ulterior motive "may be inferred from the improper act." Plaintiff's Brief in Response to Defendants' Motion at 3 (quoting Ash v. Cohn, 119 N.J.L. 54, 194 A. 174, 176 (1937)). Although this is a correct statement of the law, in light of the jury's finding of probable cause there is no improper act from which to infer an ulterior motive.

grounds. Plaintiff also seeks delay damages under Rule 238 of the Pennsylvania Rules of Civil Procedure.[16] In view of my other rulings, I need not and cannot address the damage issues. A new trial shall be held as to false imprisonment, during which plaintiff may endeavor to recover compensatory damages for all physical injuries allegedly suffered, as well as punitive damages.

An appropriate order follows.

16. Plaintiff fails to explain how a Pennsylvania procedural rule applies to a case controlled by New Jersey law.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT F. SIMONE	:	CIVIL ACTION
	:	
v.	:	
	:	
GOLDEN NUGGET HOTEL & CASINO, et al.	:	NO. 82-1450

ORDER

AND NOW, this 11th day of July, 1984, in accordance with the foregoing memorandum, it is hereby ORDERED that the cross motions for judgment notwithstanding the verdict or for a new trial are GRANTED in part and DENIED in part. It is further ORDERED that:

1. The Judgment Order dated March 31, 1983 is VACATED.

2. Judgment notwithstanding the verdict is hereby ENTERED in favor of defendant and against the plaintiff on the abuse of process claim.

3. A new trial shall be held on the false imprisonment claim. This case is attached for trial to *Vivino v. City of Phila.*, Civil Action No. 84-1790, commencing on November 5, 1984.

By the Court:

_____

J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT F. SIMONE	:	CIVIL ACTION
	:	
v.	:	
	:	
GOLDEN NUGGET HOTEL & CASINO, et al.	:	NO. 82-1450

JUDGMENT ORDER

AND NOW, this 11th day of July, 1984, JUDGMENT is hereby entered in favor of the defendant and against the plaintiff on assault and battery (Count II), malicious prosecution (Count III) and abuse of process (Count IV).

By the Court:

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J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-1454

SIMONE, ROBERT F.

Appellant

v.

GOLDEN NUGGET HOTEL AND CASINO,
trading as G.N.A.C. Corp.

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, and VAN DUSEN, *Circuit Judges*

The petition for rehearing filed by

APPELLANT

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court:

Judge

Dated: April 16, 1985